

**Dolores Provencio**  
County Clerk / Recorder

**P Public**

**Doc#:** 2009 - 000677



**Titles:** 1      **Pages:** 17

Fees	0.00
Taxes	0.00
Other	0.00
PAID	\$0.00

RECORDING REQUESTED BY:

City of Brawley  
c/o Yazmin Arellano  
400 Main Street  
Brawley, California 92227

WHEN RECORDED, MAIL TO:

Department of Toxic Substances Control  
5796 Corporate Avenue  
Cypress, California 90630  
Attention: Rania A. Zabaneh,  
Project Manager  
Brownfields and Environmental  
Restoration Program

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

## COVENANT TO RESTRICT USE OF PROPERTY

### ENVIRONMENTAL RESTRICTION

Re: **"County Assessor's Parcel Numbers (APNs) 048-430-004 and 048-042-015 in the County of Imperial, California" Wildcat Drive Property (Site Code 401328)**

This Covenant and Agreement ("Covenant") is made by and between the City of Brawley (the "Covenantor"), the current owner of property situated in Brawley, Imperial County, State of California, described in Exhibit "A" and depicted in Exhibit "B," attached, (the "Property"), and the Department of Toxic Substances Control (the "Department"). Pursuant to Civil Code section 1471, the Department has determined that this Covenant is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials as defined in Health and Safety Code section 25260. The Covenantor and Department, collectively referred to as the "Parties," hereby agree, pursuant to Civil Code section 1471, and Health and Safety Code section 25355.5 that the use of the Property be restricted as set forth in this Covenant; and the Parties further agree that the Covenant shall conform with the requirements of California Code of Regulations,

ARTICLE I  
STATEMENT OF FACTS

1.01. The Property, totaling approximately 13,300 square feet, is more particularly described and depicted in the attached Exhibits "A" and "B". The Property is located beneath the asphalt covered road known as Wildcat Drive, surrounded by Highway 86 and the Bryant Canal to the west, Bryant Canal to the north, Western Avenue to the east, and agricultural areas to the south and west. The Property is also generally described as a portion of Wildcat Drive with APNs 048-430-004 and 048-042-015 in the County of Imperial, California.

1.02. This Property is a portion of a 25-acre rectangular piece of land located in an agricultural area. It has been used for agricultural and residential purposes from 1945 to the present. Part of this land used to be a former runway. This runway measures 1,200 feet in length (from east to west) and is approximately 105 feet wide (approximately 2.9 acres). Historical documents indicate that soil nutrients, pesticides, and herbicides were used at the site. The dirt runway, located on the northern portion of this land, was used for loading agricultural chemicals onto crop dusters that subsequently air sprayed the chemicals onto the surrounding fields. Previous investigations detected organochlorine phosphates (OCPs) contamination in soil in the runway area, extending 18 inches to 24 inches below ground surface (bgs). A Wal-Mart facility is scheduled to be built south of the runway. Wildcat Drive was built on top of the former runway with the soils being recompacted in place to serve as a portion of the road subgrade and to act as a cap ("Cap") over the contamination.

1.03. The Department entered into a Voluntary Cleanup Agreement in November 2006, with the City of Brawley to conduct an evaluation of various reports and data provided by the City. The focus of the review was to determine if enough information is available to ascertain if further action is necessary at the Property and if



the site conditions are acceptable for the development of Wildcat Drive. The Department determined that further action was needed at the Property. Further sampling and analysis to define the extent of the contamination on the Property and a thorough site conceptual model delineating the vertical and horizontal extent of the contamination outside of the proposed roadway were recommended by the Department. As a result, the Department requested that the City of Brawley submit a Workplan to further characterize the Property and to provide rational on how post excavation sampling will demonstrate that soil containing chemicals of potential concern (COPCs) have been remediated to an acceptable level. Subsequently, a Supplemental Soil Sampling Workplan dated May 31, 2007 and approved by DTSC on June 15, 2007, Supplemental Soil Investigation (SSI) dated June 22, 2007, Results of SSI dated July 16, 2007, and a Remedial Excavation and Confirmation Soil Sampling Summary Report dated February 19, 2008 and revised on March 6, 2008, were submitted to the Department. Excavation activities of OCP-impacted soil on and surrounding the Property took place and were then recompactd in place under the road to serve as a portion of the road subgrade.

1.04. As detailed in the Kleinfelder, Inc. Human Health Risk Assessment, dated May 5, 2006, portions of the surface and subsurface soils on the Property contain hazardous substances as defined in Health and Safety Code section 25316. Seven chemicals designated as COPCs were detected in samples taken at the Property. These chemicals were:

- a) 4,4'-DDD
- b) 4,4'-DDE
- c) 4,4'-DDT
- d) dieldrin
- e) endosulfan
- f) heptachlor epoxide
- g) toxaphene

1.05. All soils with contaminants detected above California Human Health Hazard Screening Levels (CHHSLs) were excavated and placed into an engineered Area of Contamination (AOC) beneath Wildcat Drive. (See Attachment "A" for specific AOC boundary delineation; Attachment "B" for a map of the Wildcat Drive area, and Attachment "C" for the legal description of the AOC.) According to the Remedial Excavation and Confirmation Soil Sampling Summary Report dated February 19, 2008 (and revised March 6, 2008) several excavation activities were conducted at the site soil in 2007 and confirmatory soil samples collected after each excavation (from August 2007 to December 2007). The maximum concentration of dieldrin and toxaphene detected in the last set of confirmatory samples were 139 micrograms per kilogram ( $\mu\text{g}/\text{kg}$ ) [CHHSL of 130  $\mu\text{g}/\text{kg}$ ] and 2,070  $\mu\text{g}/\text{kg}$  [CHHSL of 1,800  $\mu\text{g}/\text{kg}$ ], respectively, in sample WSE-6.

1.06. In the Human Health Risk Assessment, exposure to shallow soil for the construction worker scenario resulted in an excess lifetime cancer risk of  $1 \times 10^{-6}$  and a hazard index of 0.047. The Department uses cancer risk of  $1 \times 10^{-6}$  and a hazard index of 1.0 as significant health risk criteria. Therefore, the Human Health Risk Assessment concluded that no unacceptable excess cancer risk to road construction workers or expected retail shoppers or workers associated with the proposed Wal-Mart store under construction to the south of Wildcat Drive, would occur once the OCP-impacted soils are capped beneath the road surface. Therefore, construction of Wildcat Drive in the area of the former airstrip will prevent future exposures to the pesticide-affected soil as long as the road remains intact and the road subgrade is undisturbed. If roadwork is required in the future, the Owner shall get prior approval from the Department and the appropriate health and safety measures will be taken to protect human health and the environment.

1.07. Based on Kleinfelder's report of February 19, 2008 and revised March 6, 2008, entitled "Remedial Excavation and Confirmation Soil Sampling Summary Report," the Department has concluded that the Property, as is, and subject to the restrictions of this Covenant, does not present an unacceptable threat to human safety or the environment, if limited to use as a roadway.

ARTICLE II  
DEFINITIONS

2.01. Department. "Department" means the California Department of Toxic Substances Control and includes its successor agencies, if any.

2.02. Environmental Restrictions. "Environmental Restrictions" means all protective provisions, covenants, restrictions, prohibitions, and terms and conditions as set forth in any section of this Covenant.

2.03. Improvements. "Improvements" includes, but is not limited to: buildings, structures, roads, driveways, improved parking areas, wells, pipelines, or other utilities.

2.04. Lease. "Lease" means lease, rental agreement, or any other document that creates a right to use or occupy any portion of the Property.

2.05. Occupant. "Occupant" means Owners and any person or entity entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

2.06. Owner. "Owner" means the Covenantor, and all successors in interest including heirs and assigns, who at any time hold title to all or any portion of the Property.

ARTICLE III  
GENERAL PROVISIONS

3.01. Runs with the Land. This Covenant sets forth Environmental Restrictions that apply to and encumber the Property and every portion thereof no matter how it is improved, held, used, occupied, leased, sold, hypothecated, encumbered, or conveyed. This Covenant: (a) runs with the land pursuant to Health and Safety Code section



25355.5 and Civil Code section 1471; (b) inures to the benefit of and passes with each and every portion of the Property, (c) is for the benefit of, and is enforceable by the Department, and (d) is imposed upon the entire Property unless expressly stated as applicable only to a specific portion thereof.

3.02. Binding upon Owners/Occupants. Pursuant to the Health and Safety Code, this Covenant binds all owners of the Property, their heirs, successors, and assignees, and the agents, employees, and lessees of the owners, heirs, successors, and assignees. Pursuant to Civil Code section 1471, all successive owners of the Property are expressly bound hereby for the benefit of the Department.

3.03. Incorporation into Deeds and Leases. This Covenant shall be incorporated by reference in each and every deed and Lease for any portion of the Property.

3.04. Conveyance of Property. The Owner shall provide written notice to the Department not later than thirty (30) days after any conveyance of any ownership interest in the Property (excluding Leases, and mortgages, liens, and other non-possessory encumbrances). The written notice shall include the name and mailing address of the new owner of the Property and shall reference the site name and site code as listed on page one of this Covenant. The notice shall also include the Assessor's Parcel Number (APN) noted on page one. If the new owner's property has been assigned a different APN, each such APN that covers the Property must be provided. The Department shall not, by reason of this Covenant, have authority to approve, disapprove, or otherwise affect proposed conveyance, except as otherwise provided by law or by administrative order.

3.05. Costs of Administering the Covenant to be paid by Owner. The Department has already incurred and will in the future incur costs associated with the administration of this Covenant. Therefore, the Covenantor hereby covenants for the Covenantor and for all subsequent Owners that, pursuant to California Code of

Regulations, title 22, section 67391.1(h), the Owner agrees to pay the Department's costs in administering the Covenant.

#### ARTICLE IV RESTRICTIONS AND REQUIREMENTS

4.01. Prohibited Uses. The Property shall not be used for any of the following purposes:

- (a) A residence, including any mobile home or factory built housing, constructed or installed for use as residential human habitation.
- (b) A hospital for humans.
- (c) A public or private school for persons under 21 years of age.
- (d) A day care center for children.

4.02. Soil Management

- (a) Any contaminated soils brought to the surface by grading, excavation, trenching or backfilling shall be managed in accordance with all applicable provisions of state and federal law.
- (b) The Owner shall provide the Department written notice at least fourteen (14) days prior to any road maintenance involving the Property that will generate waste and dispose offsite.

4.03. Non-Interference with Cap

- (a) Activities that may disturb the Cap (e.g. excavation, grading, removal, trenching, filling, earth movement, or mining) shall not be permitted on the Capped Property without prior written approval by the Department.
- (b) All uses and development of the Capped Property shall preserve the integrity or effectiveness of the Cap.
- (c) The Cap shall not be altered without prior written approval by the

Department.

4.04. Access for Department. The Department shall have reasonable right of entry and access to the Property for inspection, monitoring, and other activities consistent with the purposes of this Covenant as deemed necessary by the Department in order to protect the public health or safety, or the environment.

4.05. Inspection and Reporting Requirements. The Owner shall conduct an annual inspection of the Property verifying compliance with this Covenant, (i.e inspect the Cap and ensure its integrity and effectiveness), and shall submit an annual inspection report to the Department for its approval by January 15<sup>th</sup> of each year. The annual inspection report must include the dates, times, and names of those who conducted the inspection and reviewed the annual inspection report. It also shall describe how the observations were performed that were the basis for the statements and conclusions in the annual inspection report (e.g., drive by, fly over, walk in, etc.). If violations are noted, the annual inspection report must detail the steps taken to return to compliance. If the Owner identifies any violations of this Covenant during the annual inspections or at any other time, the Owner must within ten (10) days of identifying the violation: determine the identity of the party in violation, send a letter advising the party of the violation of the Covenant, and demand that the violation ceases immediately. Additionally, copies of any correspondence related to the violation of this Covenant shall be sent to the Department within ten (10) days of its original transmission.

## ARTICLE V

### ENFORCEMENT

5.01. Enforcement. Failure of the Owner or Occupant to comply with this Covenant shall be grounds for the Department to require modification or removal of any Improvements constructed or placed upon any portion of the Property in violation of this Covenant. Violation of this Covenant, including but not limited to, failure to submit, or the submission of any false statement, record or report to the Department, shall be grounds for the Department to pursue administrative, civil, or criminal actions, as



provided by law.

## ARTICLE VI

### VARIANCE, TERMINATION, AND TERM

6.01. Variance. Owner, or any other aggrieved person, may apply to the Department for a written variance from the provisions of this Covenant. Such application shall be made in accordance with Health and Safety Code section 25233.

6.02 Termination or Partial Termination. Owner, or any other aggrieved person, may apply to the Department for a termination or partial termination of one or more terms of this Covenant as they apply to all or any portion of the Property. Such application shall be made in accordance with Health and Safety Code section 25234.

6.03 Term. Unless ended in accordance with paragraph 6.02, by law, or by the Department in the exercise of its discretion, this Covenant shall continue in effect in perpetuity.

## ARTICLE VII

### MISCELLANEOUS

7.01. No Dedication Intended. Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property, or any portion thereof to the general public or anyone else for any purpose whatsoever.

7.02 Department References. All references to the Department include successor agencies/departments or other successor entity.

7.03. Recordation. The Covenantor shall record this Covenant, with all referenced Exhibits, in the County of Imperial within ten (10) days of the Covenantor's receipt of a fully executed original.

7.04. Notices. Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (1) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served, or (2) three (3) business days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

To Owner:           City of Brawley  
                          c/o Ms. Yazmin Arellano  
                          Director of Public Works  
                          400 Main Street  
                          Brawley, CA 92227

And

To Department:    Ms. Rania Zabaneh  
                          Project Manager  
                          Department of Toxic Substances Control  
                          5796 Corporate Avenue  
                          Cypress, CA 90630

Any party may change its address or the individual to whose attention a Notice is to be sent by giving written Notice in compliance with this paragraph.

7.05. Partial Invalidity. If this Covenant or any of its terms are determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions of this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein.

7.06. Statutory References. All statutory references include successor provisions.

7.07. Incorporation of Attachments. All attachments and exhibits to this Covenant are incorporated herein by reference.



## LEGAL DESCRIPTION

THOSE PORTIONS OF WILDCAT DRIVE, IN THE CITY OF BRAWLEY, COUNTY OF IMPERIAL, STATE OF CALIFORNIA, DEDICATED PER FINAL MAP - BRAWLEY GATEWAY-UNIT 1, RECORDED ON FEBRUARY 28<sup>TH</sup>, 2006 IN BOOK 24, PAGES 77-85 OF FINAL MAPS OF SAID COUNTY, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

### AREA OF CONTAMINATION NO. 1

COMMENCING AT THE CENTERLINE INTERSECTION OF WILDCAT DRIVE AND WESTERN AVENUE AS SHOWN AND DEDICATED PER SAID FINAL MAP - BRAWLEY GATEWAY UNIT 1, THENCE WESTERLY ALONG SAID CENTERLINE OF WILDCAT DRIVE SOUTH 89°31'15" WEST 128.10 FEET, THENCE DEPARTING SAID CENTERLINE NORTH 00°28'45" WEST 10.00 FEET TO A POINT ON A LINE WHICH IS PARALLEL WITH AND 10.00 FEET NORTHERLY, MEASURED AT RIGHT ANGLES, FROM SAID CENTERLINE AND ALSO BEING THE **TRUE POINT OF BEGINNING**; THENCE ALONG SAID PARALLEL LINE SOUTH 89°31'15" WEST 290.00 FEET TO A POINT HEREINAFTER DESIGNATED AS POINT "A"; THENCE DEPARTING SAID PARALLEL LINE, NORTH 00°28'45" WEST 20.00 FEET TO A LINE WHICH IS PARALLEL WITH AND 30.00 FEET NORTHERLY, MEASURED AT RIGHT ANGLES, FROM THE SAID CENTERLINE OF WILDCAT DRIVE; THENCE ALONG SAID PARALLEL LINE NORTH 89°31'15" EAST 290.00 FEET; THENCE DEPARTING SAID PARALLEL LINE SOUTH 00°28'45" EAST 20.00 FEET TO THE **TRUE POINT OF BEGINNING**.

### TOGETHER WITH:

### AREA OF CONTAMINATION NO. 2

THAT PORTION OF WILDCAT DRIVE, IN THE CITY OF BRAWLEY, COUNTY OF IMPERIAL, STATE OF CALIFORNIA, DEDICATED PER FINAL MAP - BRAWLEY GATEWAY-UNIT 1, RECORDED ON FEBRUARY 28<sup>TH</sup>, 2006 IN BOOK 24, PAGES 77-85 OF FINAL MAPS OF SAID COUNTY, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT SAID POINT "A" THENCE ALONG A LINE WHICH IS PARALLEL WITH AND 10.00 FEET NORTHERLY OF SAID CENTERLINE OF WILDCAT DRIVE, SOUTH 89°31'15" WEST 110.00 FEET TO THE **TRUE POINT OF BEGINNING**; THENCE CONTINUING ALONG SAID PARALLEL LINE SOUTH 89°31'15" WEST 300.00 FEET; THENCE DEPARTING SAID PARALLEL LINE, NORTH 00°28'45" WEST 25.00 FEET TO A LINE WHICH IS PARALLEL WITH AND 35.00 FEET NORTHERLY, MEASURED AT RIGHT ANGLES, FROM THE SAID CENTERLINE OF WILDCAT DRIVE; THENCE ALONG SAID PARALLEL LINE NORTH 89°31'15" EAST 300.00 FEET; THENCE DEPARTING SAID PARALLEL LINE SOUTH 00°28'45" EAST 25.00 FEET TO THE **TRUE POINT OF BEGINNING**.



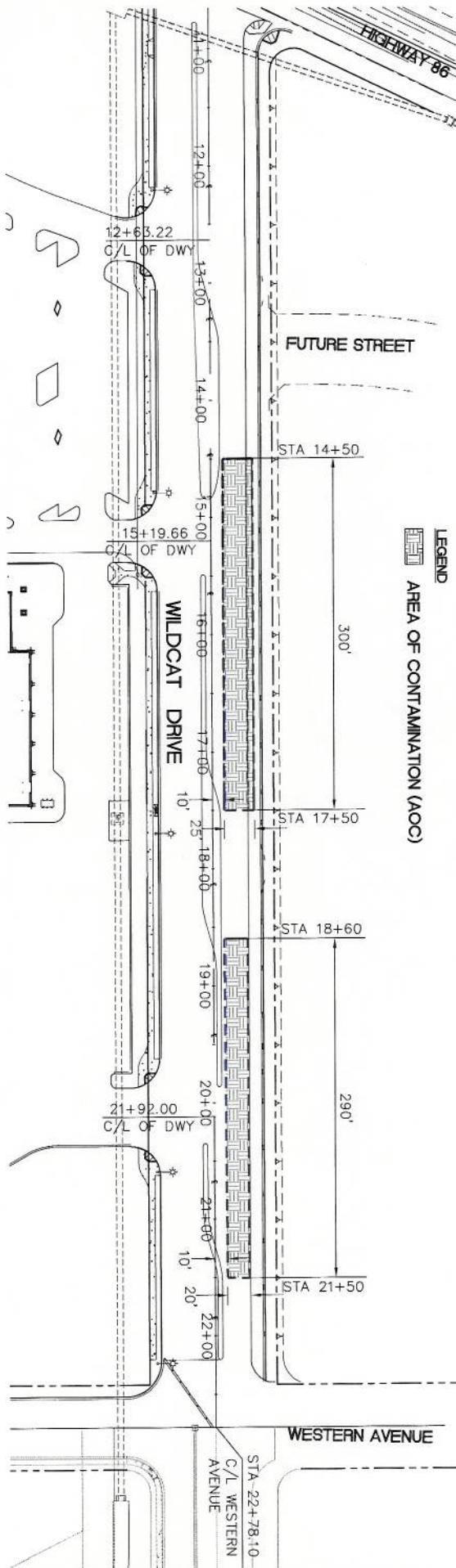
301-052.1

Prepared by DK Nasland, PLS 5562

My license renews 9-30-2009

7/21/2008

9:47:50 AM



# AREA OF CONTAMINATION EXHIBIT

NO.	DESCRIPTION	BY	DATE
1	FIG. 2 PLAN CHECK AND CONSIDERED PRELIMINARY		
2	UNIT APPROVED BY:		
3	DRAWING SCALE	AS SHOWN ON DRAWING	
4	DATE		
5	DESIGNER	KEE, INC.	
6	DATE		
7	PREPARED UNDER THE DIRECTION OF:		
8	DATE		
9	APPROVED	WAL-MART #6535-00	
10	DATE		
11	PROJECT	BRAWLEY, IMPERIAL COUNTY	
12	DATE		
13	PROJECT	WAL-MART STORES, INC.	
14	DATE		

**NASLAND ENGINEERING**  
CITY ENGINEERING & LAND PLANNING  
1910 Pacific Street, San Diego, California 92106-0870



WAL-MART #6535-00  
BRAWLEY, IMPERIAL COUNTY  
WAL-MART STORES, INC.  
DATE: 09/20/08  
BY: [Signature]  
N.E. 309 30-0001



**STATE OF CALIFORNIA}**  
**COUNTY OF IMPERIAL}**  
**CITY OF BRAWLEY}**

On **December 8, 2008**, before me **Alma Benavides**, City Clerk, personally appeared Gary Burroughs who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

Witness my hand and official seal



Alma Benavides, City Clerk

Civil Code 1189 Certificate of Acknowledgement

(City Seal)

**STATE OF CALIFORNIA}**  
**COUNTY OF IMPERIAL}**  
**CITY OF BRAWLEY}**

On **December 8, 2008**, before me **Alma Benavides**, City Clerk, personally appeared Gary Burroughs who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.


Witness my hand and official seal



Alma Benavides, City Clerk

Civil Code 1189 Certificate of Acknowledgement

(City Seal)





IN WITNESS WHEREOF, the Parties execute this Covenant.

Covenantor: The City of Brawley

By: Mary Bunnell  
Title: City Manager  
Date: 12/08/08

Department of Toxic Substances Control

By: Rania A. Zabaneh  
Title: Project Manager  
Date: [Signature] 12/29/08

CYBERESS  
DEC 30 2008  
DTSC

IN WITNESS WHEREOF, the Parties execute this Covenant.

Covenantor: The City of Brawley

By: 


Title: City Manager

Date: 12/8/2008

Department of Toxic Substances Control

By: Rania A. Zabaneh

Title: Project Manager

Date:  12/10/08

CYPRESS  
DEC 10 2008  
DTSC

Department of Toxic Substances Control

By: \_\_\_\_\_

Title: Rania Zabaneh, Project Manager  
Brownfields and Environmental Restoration Program  
Cypress Office

Date: 12/29/08

**ACKNOWLEDGEMENT**

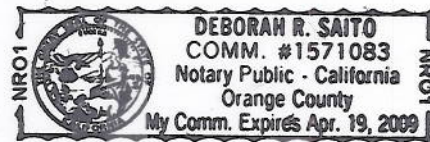
State of California )  
County of Orange )

On December 29, 2008 before me Deborah R. Saito,  
(insert name and title of the officer)

Notary Public, personally appeared Rania Zabaneh,  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)  
is/are subscribed to the within instrument and acknowledged to me that he/she/they  
executed the same in his/her/their authorized capacity(ies) and that by his/her/their  
signature(s) on the instrument the person(s), or the entity upon behalf of which the  
person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature Deborah R. Saito (Seal)